In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-488

JESUS AGUILERA-ENRIQUEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is an indigent native of Mexico who obtained resident alien status in 1967. After his conviction for possessing cocaine he was ordered deported. He contends that he was denied due process of law because counsel was not appointed at government expense to represent him at his deportation hearing.

Petitioner entered the United States as an immigrant on December 18, 1967. On April 12, 1972, he pleaded guilty in the United States District Court for the Western District of Texas to possession of cocaine, in violation of 21 U.S.C. 844(a).

At a deportation hearing held February 6, 1973, petitioner asked that counsel be appointed to represent him at government expense. The immigration judge denied the

request, as he was required to do under the Immigration and Nationality Act.[1] Thereupon the immigration judge found petitioner deportable under Section 241(a)(11) of the Act, 8 U.S.C. 1251(a)(11), for having been convicted of a narcotics offense.

Petitioner appealed the deportation order to the Board of Immigration Appeals. At this proceeding petitioner was represented by counsel. He argued that his conviction for possession of cocaine was not yet final for deportation purposes because, after the decision of the immigration judge, he had filed a post-conviction motion to withdraw his guilty plea and that motion had not yet been decided. The Board dismissed the appeal on February 1, 1974 (Pet. App. A).

The court of appeals on petition for review upheld the deportation order (one judge dissenting), ruling that although due process requires that counsel be provided to indigent aliens at deportation hearings whenever it would be necessary to ensure fundamental fairness, this situation was not present here (Pet. App. B, pp. 32-48).[2]

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[1]8 U.S.C. 1252(b) provides in part:

> [t]he alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

8 U.S.C. 1362 provides:

> In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

[2]Petitioner's motion to withdraw his guilty plea was dismissed by the sentencing court before the court of appeals' decision in this case (Pet. App. 43).

1. Petitioner contends that the Court should review the judgment below because the Fifth and Sixth Circuits have taken a position that "conflicts with applicable decisions of the Third, Seventh, Ninth and Tenth Circuits regarding appointed counsel in the deportation context" (Pet. 13). This misperceives the state of the law in the courts of appeals.

No court of appeals has ever held that indigent aliens have a due process right to the assistance of counsel at the government's expense in all deportation proceedings. In fact, the Sixth Circuit in the case at bar is the first court of appeals to have recognized such a right in any circumstance: it held that counsel must be appointed when necessary to the fundamental fairness of the administrative proceeding (Pet. App. 36). This decision does conflict with *Tupacyupanqui-Marin* v. *Immigration and Naturalization Service*, 447 F.2d 603 (C.A. 7), and *Martin-Mendoza* v. *Immigration and Naturalization Service*, 499 F.2d 918 (C.A. 9), certiorari denied, 419 U.S. 1113, where it was held that there is no right to appointed counsel in *any* administrative proceeding leading to deportation.

Tupacyupanqui-Marin, however, was decided before this Court's decision in *Gagnon* v. *Scarpelli*, 411 U.S. 778, and *Martin-Mendoza* was decided primarily on the alternative holding that the alien in that case was in fact represented by counsel and therefore was not denied due process (499 F.2d at 922). Thus it is not clear that, in light of *Gagnon* and the Sixth Circuit's decision in the instant case, the Seventh and Ninth Circuits will adhere to their previous rulings and perpetuate the conflict now existing. Indeed, the Seventh Circuit has already indicated that *Tupacyupanqui-Marin* may no longer be good law (see page 5, *infra*). There is, accordingly, no need for the Court to review the issue at this time.

Contrary to petitioner's assertions, the Fifth, Third, and Tenth Circuits have not yet taken sides. In *Ah Chiu Pang* v. *Immigration and Naturalization Service,* 368 F.2d 637 (C.A. 3), the issue was whether the alien (who was represented by counsel at the deportation proceedings) was entitled to have been advised of his statutory right to counsel and of his constitutional rights when he was first apprehended by immigration officers. The court's statement that it was "not prepared to extend to aliens in deportation proceedings the same immunities to be accorded defendants in criminal cases" (*id.* at 639) cannot be said to have decided the question, never raised in that case, whether due process requires appointed counsel during deportation proceedings.

In *Barthold* v. *Immigration and Naturalization Service,* 517 F.2d 689, 690 (C.A. 5), the court explicitly declined to reach the constitutional issue when it found that the alien had waived any right to counsel that he may have had. *Burquez* v. *Immigration and Naturalization Service,* 513 F.2d 751 (C.A. 10), also is not in conflict with the Seventh and Ninth Circuit decisions holding that there is no right to appointed counsel under any circumstance, or with the Sixth Circuit decision herein, upholding a right to appointed counsel when necessary to assure fundamental fairness. *Burquez* held simply that due process is not violated by lack of appointed counsel in deportation proceedings when counsel's presence is in fact unnecessary to fundamental fairness.

The Second Circuit reached the same result in *Henriques* v. *Immigration and Naturalization Service,* 465 F.2d 119, certiorari denied, 410 U.S. 968, holding that, whatever may be the proper rule when the alien suffers prejudice for want of counsel, due process does not require that counsel be appointed when it would make no difference to the outcome of the administrative proceedings.

Petitioner states (Pet. 14) that *Chlomos* v. *Immigration and Naturalization Service,* 516 F.2d 310 (C.A. 3), "rejects the proposition that due process requires the

assistance of counsel *only* when counsel can affect the outcome of the deportation proceeding" (emphasis in original). *Chlomos* involved a claim that the immigration judge had unduly curtailed the alien's right, conferred by statute, to retained counsel (see note 1, *supra*), and the court expressly noted that it was not faced with the question whether due process requires appointed counsel for indigents. Moreover, the court also explicitly declined to reach the question whether it was necessary for the alien to show prejudice from the denial of retained counsel, since it found prejudice in any event (*id.* at 314).

Finally, *Castaneda-Delgado* v. *Immigration and Naturalization Service,* No. 74-1893, decided November 26, 1975 (C.A. 7),[3] involved an unreasonable curtailment of the statutory right to retained counsel, and there also the court expressly refused to reach the question whether indigent aliens have a constitutional right to the appointment of counsel at government expense in administrative proceedings leading to deportation (slip op. 2 and 12 n. 5). Indeed, the court's willingness to leave the question open and its failure to mention *Tupacyupanqui-Marin* would seem to indicate that the ruling in the latter case against requiring appointed counsel under any circumstances may be open to reconsideration.

In short, it is not clear that the existing disagreement, newly arisen as a result of the decision below, will persist.

2. More importantly, petitioner stands nothing to gain by this Court's resolution of the conflict, since the result here is the same whether there is no right to appointed counsel in deportation proceedings or whether there is such a right when counsel's presence and participation is indispensable to fundamental fairness. As the court of

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[3]Brought to the Court's attention by petitioner's letter of December 12, 1975.

appeals correctly held (Pet. App. 36-38), petitioner was not denied fundamental fairness since he was represented by counsel before the Board of Immigration Appeals and was not prejudiced by the lack of counsel at the initial hearing.[4]

In short, the outcome of this case would be the same even if this Court took the Sixth Circuit's approach, which constitutes the most favorable ruling to petitioner among the various circuits that have considered the arguments he makes here. It is therefore inappropriate to use this case to resolve the conflict.

3. To the extent that petitioner argues for an unqualified right to counsel at government expense for indigents faced with deportation proceedings, regardless of whether the assistance of counsel would be necessary to assure fundamental fairness, such a rule would go beyond that required by any court of appeals, or by this Court in analogous situations, and would be unwarranted.

In *Gagnon* v. *Scarpelli*, 411 U.S. 778, where the issue was whether there is a due process right to appointed counsel in a noncriminal, adminstrative context, this Court

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[4]The sole question at the deportation hearing was whether petitioner had been convicted of a narcotics offense—a factual question that could not have been answered differently by counsel than by petitioner himself. On the question whether his attempt to withdraw his guilty plea affected the finality of his conviction for deportation purposes, petitioner was represented by counsel before the Board of Immigration Appeals, and, as the court noted (Pet. App. 38), "[t]he lack of counsel before the Immigration Judge did not prevent full administrative consideration of his argument." Petitioner suggests no arguments that he might have made before the immigration judge if he had been represented by counsel that were foreclosed to him on administrative review, when he was represented. Thus, petitioner had the assistance of counsel at a point early enough to assert any claims he may have had.

held that indigents have no constitutional right to appointed counsel in all probation or parole revocation cases. Much of the reasoning behind that ruling applies here. An across-the-board right to appointed counsel in all deportation proceedings "would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel" (411 U.S. at 787).

Petitioner's argument in favor of a constitutional right to appointed counsel in all deportation proceedings goes well beyond *Gagnon*. Due process is not so rigid, however, as to require that the flexibility and economy that now characterize the administrative proceedings in deportation cases must always be sacrificed (see *id.* at 788).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

DOJ-1975-12